IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA HILLEGASS, Plaintiff, v. THE BOROUGH OF EMMAUS, ROGER WHITCOMB, CRAIG NEELY, LEE ANN GILBERT, SUSAN SCHMIDT, and JOYCE MARIN, Defendants.	: : : : : : : : : :	CIVIL ACTION No. 01-CV-5853

MEMORANDUM AND ORDER

J. M. KELLY, J. **JUNE , 2003**

Presently before the Court is a Motion for Summary Judgment filed by Defendants Borough of Emmaus ("Borough") and Borough Council members Roger Whitcomb, Craig Neely, Lee Ann Gilbert, Susan Schmidt and Joyce Marin ("Borough Council") (collectively, the "Defendants") challenging allegations of sex and age discrimination and civil rights violations filed by Plaintiff Donna Hillegass ("Hillegass").[1] Hillegass, a former Borough

[1] As a preliminary matter, this Court considers only the Summary Judgment Motion filed by Defendants on February 14, 2003 and not the June 11, 2002 Motion for Judgment on the Pleadings filed by Defendants. By an order issued on July 24, 2002 by Judge Anita B. Brody, Defendants' Motion for Judgment on the Pleadings was converted to a Motion for Summary Judgment to afford Hillegass additional time for discovery on the issues Defendants raised therein. On August 14, 2002, Judge Brody denied Defendants' Motion for Judgment on the Pleadings as moot in light of its July 24, 2002 order, and ordered that Defendants may refile its Motion for Summary Judgment after completion of discovery. Accordingly, upon the close of discovery on February 14, 2003, Defendants filed a Motion for Summary Judgment. For these reasons, this memorandum and order does not address the arguments raised in Defendants' Motion for Judgment on the Pleadings, which Judge Brody dismissed as moot, and we review

employee, alleges that Defendants unlawfully discharged her from her position as Borough Manager without affording her procedural due process protections guaranteed by the Fourteenth Amendment, and without complying with those procedures outlined in the Borough's Personnel Policy, on the basis of her sex (female) and age (56-years old). After submitting a charge of sex and age discrimination to the United States Equal Employment Opportunity Commission ("EEOC") that was concurrently filed with the Pennsylvania Human Relations Commission ("PHRC"), Hillegass filed suit in this Court alleging violations of the Federal Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983"), Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. § 955, et seq.

Defendants claim that dismissal is warranted at this time because Hillegass failed to exhaust her administrative remedies by withdrawing her discrimination charge from the EEOC prior to an investigation, and, in any event, has not made a prima facie case of sex or age discrimination to support her ADEA, Title VII or state law claims. Moreover, Defendants argue that Hillegass's Section 1983 claim must also fail since she has no property interest in her position with the Borough to support a viable

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only the February 14, 2003 Motion for Summary Judgment.

civil rights claim and that Defendants are nevertheless entitled to absolute legislative and qualified immunity for their decision to terminate Hillegass. For the following reasons, Defendants' Motion for Summary Judgment is **GRANTED IN PART and DENIED IN PART**.

I. BACKGROUND

From December 1997 to January 2000, Hillegass served as Borough Manager, a position to which she was appointed by Defendants to serve "at the pleasure of the Council," and "subject to removal at any time by a majority vote of all the members of Borough Council."[2] (Emmaus Borough Code, Defs. Mot. for Summ. J. Ex. B. at 6.) As Borough Manager, Hillegass was responsible for administering the activities of all office and clerical employees of the Borough and enforcing all Borough ordinances and laws. (Id.) On December 27, 1999, in accordance with the Emmaus Borough Code, the Borough Council officially

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[2] The Emmaus Borough Code states, in pertinent part:

> The Borough Council shall elect by a majority vote of all members one (1) person to fill the office of Borough Manager. That person shall serve at the pleasure of Borough Council. The Borough Manager shall be subject to removal at any time by a majority vote of all the members of Borough Council.

(Borough Code § 103(2), Defs. Mot. Ex. B at 6.) Pennsylvania law also provides that the Borough Manager is "subject to removal by the council at any time by a vote of the majority of all the members." 53 Pa. Cons. Stat. § 46141.

reappointed Hillegass to another one-year term as Borough Manager.

On January 12, 2000, several newly-elected members of the Borough Council were sworn into office. On the same day, by a 5-2 majority vote of the Borough Council, Hillegass was terminated from her position as Borough Manager without receiving advanced warning as required by the Borough's Personnel Policy. This Policy provides that all Borough employees subject to termination would receive advanced warning of work rule violations prior to discharge and guaranteed that Borough employees "may be involuntarily terminated only as a last resort following the guidelines as set forth in the Progressive Discipline Policy." (Borough of Emmaus Personnel Policy, Hillegass Resp. Vol. II Ex. A.)

Defendants subsequently replaced Hillegass with Mark Vasoli ("Vasoli"), a younger male, to serve as the interim Borough Manager. On June 5, 2000, Hillegass filed charges with the EEOC and the PCRA alleging sex and age discrimination. (Defs. Mot. Ex. C.) Thereafter, the EEOC determined that Hillegass's charge of discrimination fell within Section 321 of the Civil Rights Act of 1991, which governs discrimination claims filed by state employees appointed by elected officials. See 42 U.S.C. § 2000e-

16c.[3] In a letter to the EEOC dated August 24, 2001, Hillegass's attorney, Donald P. Russo, Esquire, expressed dissatisfaction with the EEOC's characterization of Hillegass's claim as a Section 321 charge and requested that the EEOC reconsider its decision or issue a notice of right to sue letter. (Russo Letter of 8/24/01, Defs. Mot. Ex. D.) In a letter dated September 27, 2001, the EEOC responded that it had not changed its characterization of Hillegass's discrimination charge and advised

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[3] Section 321, as codified at 42 U.S.C. § 2000e-16 states that:

> All personnel actions affecting the . . . State employees described in section 304 [42 UCS § 2000e-16c] shall be made free from any discrimination based on--
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> (1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16);
> (2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or
> (3) disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

42 U.S.C. § 2000e-16(b). Section 321 applies to those individuals that are:

> chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof--
> (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

42 U.S.C. § 2000e-16c.

Hillegass that she would not receive a right to sue letter because the administrative enforcement mechanism under Section 321 is different from the EEOC's private charge resolution procedures. (EEOC Letter of 9/27/01, Hillegass Compl. Ex. A.)[4] The EEOC offered that Hillegass could instead withdraw her EEOC charge and administratively close the file. (Id.) On November 21, 2001, Hillegass filed her instant claims of discrimination and civil rights violations in federal court.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.

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[4] The EEOC stated:

> In your letter, you advised that you were seeking a Notice of Right to Sue from EEOC. Please note that because the administrative enforcement mechanism under Section 321 is different from EEOC's private charge resolution procedures, there is no provision for obtaining a Notice of Right to Sue under Section 321. Although EEOC cannot provide you a Notice of Right to Sue, the complaint may be withdrawn. Under §1603.105 of the EEOC regulations, the complainant may withdraw a complaint at any time by so advising the Commission in writing.

(Hillegass Compl. Ex. A.)

56(c). Thus, this Court is required, in resolving a motion for summary judgment under Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmoving's favor. Id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Chelates Corp. v. Citrate, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

Moving for summary judgment, Defendants aver that Hillegass fails to present this Court with a cognizable claim of sex and age discrimination pursuant to Title VII, ADEA and the PHRA[5] and

[5] This Court has jurisdiction over Hillegass's Title VII and ADEA claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over her PHRA claim pursuant to 28 U.S.C. § 1367.

that, even if Hillegass satisfies the minimal prima facie elements of each claim, she fails to rebut Defendants' proffered legitimate, non-discriminatory reason for their decision to discharge her from her Borough Manager position with evidence that Defendants' reason was merely pretext for discrimination. Defendants also argue that, in any event, Hillegass's discrimination claims are not properly before this Court because she has failed to exhaust her administrative remedies with the EEOC. Moreover, Defendants contend that Hillegass's averments of civil rights violations must fail because she does not have a property interest in her employment with the Borough, as required for a claim arising under Section 1983. Pursuant to the summary judgment standard, in which all facts must be viewed in the light most favorable to the party opposing the motion, we examine the sufficiency of Hillegass's claims in turn.

A. Failure to Exhaust

Defendants argue that Hillegass's claims of sex and age discrimination are not properly before this Court because she did not obtain a right to sue letter from the EEOC and thus, failed to exhaust her administrative remedies prior to filing suit in federal court. Hillegass concedes that she was not issued a right to sue letter by the EEOC, but contends that she was

entitled to the right to sue letter after 180 days lapsed and thus, should be deemed to have exhausted her administrative remedies.

As a preliminary matter, we find that, in an age discrimination claim, a plaintiff does not need to obtain a right to sue letter from the EEOC to pursue a ADEA claim in federal court. See Seredinski v. Clifton Precision Products Co., 776 F.2d 56, 63 (3d Cir. 1985); Turton v. Sharp Steel Rule Die, Inc., No. Civ. A. 10180, 2001 U.S. Dist. LEXIS 10180, at *8 (E.D. Pa. July 19, 2001). Provided a plaintiff has timely filed an age discrimination charge with the EEOC and has waited the mandatory 60 days prior to filing an ADEA claim in federal court, she has properly exhausted her administrative remedies under the ADEA.[6] Turton, 2001 U.S. Dist. LEXIS 10180, at *7. Since Hillegass has complied with the exhaustion requirements set forth in the ADEA, we find that her ADEA claim is properly before this Court.

In contrast to the ADEA exhaustion requirements, a plaintiff may not sue under Title VII in federal court unless she has exhausted her administrative remedies by first filing a claim of sex discrimination with the EEOC within 180 days of the alleged

[6] Section Section 626(e) of the ADEA states, in pertinent part, that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." 29 U.S.C. § 626(d).

discrimination. Gooding v. Warner-Lambert Co., 744 F.2d 354, 358 (3d Cir. 1984); Johnson-Medland v. Bethanna, No. Civ. A. 96-4258, 1996 U.S. Dist. LEXIS 15748, at *19 (E.D. Pa. Oct. 17, 1996); Lynch v. Borough of Ambler, No. Civ. A. 94-6401, 1995 U.S. Dist. LEXIS 3217, at *11 (E.D. Pa. Mar. 14, 1995). Thereafter, the EEOC generally investigates the plaintiffs allegations and either resolves the claim administratively or issues a right to sue letter which signals that the plaintiff has exhausted her administrative remedies with the EEOC and may now file suit in federal court. However, this exhaustion requirement is a "non-jurisdictional prerequisite[], akin to statues of limitations and [is] subject to waiver, estoppel, and equitable tolling principles." Communications Workers of America v. New Jersey Dept. of Personnel, 282 F.3d 213, 216-17 (3d Cir. 2002). Thus, if the EEOC fails to issue a right to sue letter within 180 days of the date the plaintiff filed the discrimination charge, courts in this district have permitted a plaintiff to nonetheless maintain a Title VII action without obtaining a right to sue letter provided she can demonstrate that she requested a right to sue letter and was entitled to it. Johnson-Medland, 1996 U.S. Dist. LEXIS 15748, at *19; Lynch, 1995 U.S. Dist. LEXIS 15748, at *11.

Hillegass argues that since the EEOC did not issue a right to sue letter within 180 days of filing her charge of

discrimination with the EEOC, she has exhausted her administrative remedies as required by Title VII. Although we agree that a plaintiff may maintain a Title VII action in federal court without receiving a right to sue letter from the EEOC so long as she can demonstrate that she requested, and is entitled to, it, the September 27, 2001 EEOC letter written to Hillegass reveals that she was not issued a right to sue letter because the EEOC concluded that her discrimination complaint against Defendants did not constitute a private right of action under Title VII but, rather arises under Section 321 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-16c. (EEOC Letter, Hillegass Compl. Ex. A.) The EEOC further explained that unlike the EEOC's private charge resolution procedures, the administrative enforcement mechanism in effect for Section 321 claims does not permit the EEOC to issue a right to sue letter. (Id.) Thus, instead of pursuing a discrimination claim under Section 321, Hillegass administratively closed her file with the EEOC. (Id.) Although Hillegass demonstrates that she requested a right to sue letter from the EEOC and that the EEOC did not issue a right to sue letter within 180 days, it is not clear to this Court, after reviewing the EEOC's letter of September 27, 2001, that she was ever entitled to a right to sue letter. More importantly, if Hillegass's charge indeed falls within Section 321, this Court is without jurisdiction to adjudicate any of her

claims of discrimination since the EEOC must first render a final order in the matter. See 42 U.S.C. § 2000e-16c(b)(1).[7] Thus, we conclude that Hillegass fails to present sufficient evidence demonstrating that she is entitled to bypass the usual requirement that a plaintiff obtain a right to sue letter prior to filing suit in federal court and find that Hillegass has not properly exhausted her administrative remedies. Accordingly, we must enter summary judgment in favor of Defendants on Hillegass's Title VII claim.

B. ADEA

Defendants next assert that Hillegass fails to provide sufficient evidence of age discrimination to sustain a claim under the ADEA and the PHRA.[8] The ADEA prohibits employers from

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[7] Section 321 states, in pertinent part:

> Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

42 U.S.C. § 2000e-16c(b)(1).

[8] The PHRA, which also proscribes employment discrimination on the basis of age, is evaluated under the same framework

discriminating against individuals in "hiring, discharge, compensation, terms, conditions, or privileges of employment" on the basis of age. 29 U.S.C. § 623(a)(1). Pursuant to 29 U.S.C. § 631(a), members of the protected class encompass individuals who are at least 40 years of age.

To maintain a claim of discrimination under the ADEA, a plaintiff is required to demonstrate, by a preponderance of the evidence, that age was considered and acted upon in an employer's decisionmaking. A plaintiff may satisfy this burden by introducing either direct or indirect evidence of discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-46 (1989); Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000); McKenna v. Pacific Rail Serv., 32 F.3d 820, 826 n.3 (3d Cir. 1994). Discrimination claims supported by indirect evidence, such as those alleged in the instant case, are analyzed pursuant to the well-known burden-shifting framework introduced in the United States Supreme Court case, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Pursuant to the McDonnell Douglas analysis, a claimant seeking to prove his ADEA claim by introducing indirect evidence, as in the instant case, must satisfy the prima facie elements by demonstrating that: (1) she was a member of a

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applicable to ADEA claims and, therefore, our analysis of Hillegass's ADEA claim is the same under the PHRA. See Narvaez v. Amtrak, No. Civ. A. 01-5152, 2003 U.S. Dist. LEXIS 6599, at *4 n.2 (E.D. Pa. Mar. 29, 2003).

protected class; (2) she is qualified for the position in question; (3) she suffered an adverse employment action; and (4) the individual chosen for the position was "sufficiently younger" to permit an inference of age discrimination. Elwell v. PP&L, Inc., 47 Fed. Appx. 183, 186 (3d Cir. 2002); Connors v. Chrysler Financial Corp., 160 F.3d 971, 973 (3d Cir. 1998); Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995). To survive summary judgment, the evidence must be sufficient "to convince a reasonable factfinder to find all of the elements of the prima facie case." Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997); see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993).

Once the plaintiff establishes a prima facie case of discrimination, "a presumption that the employer unlawfully discriminated against the employee" is imposed. Burdine v. Texas Dep't of Community Affairs, 450 U.S. 248, 254 (1981). To rebut this presumption, the defendant must offer a legitimate, non-discriminatory reason underlying its adverse employment action. Hicks, 509 U.S. at 507. Provided the employer proffers such a reason, the burden then falls on the plaintiff to produce evidence demonstrating that the employer's decision is merely a pretext for discrimination. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

This Court finds that Hillegass satisfies the prima facie

elements necessary to establish a prima facie claim of age discrimination. Hillegass was 56-years old when she was terminated from her position as Borough Manager, which duties she was sufficiently qualified to perform. An inference of age discrimination is permissible since Hillegass's position was subsequently filled by a "sufficiently younger" applicant roughly 35-40 years old.[9] See, e.g., Showalter v. University of Pittsburgh Medical Ctr., 190 F.3d 231, 237 (3d Cir. 1999) (holding that an eight and 16-year age difference meets the "sufficiently younger" standard); Sempier, 45 F.3d at 729-30 (concluding that a five year age difference satisfies the "sufficiently younger" standard).

The burden then shifts to Defendants to proffer a legitimate, non-discriminatory reason to rebut Hillegass's claim of discrimination. To this end, Defendants contend that Hillegass was discharged because the Borough Council determined, after receiving complaints from Borough staff and the general public, that Hillegass lacked interpersonal skills necessary to perform her job. Since Defendants proffer a legitimate, non-discriminatory reason for her termination, the burden now falls on Hillegass to "point to evidence establishing a reasonable

[9] Neither party states the exact age of Vasoli, the applicant who replaced Hillegass. However, both Hillegass and Defendants speculate that Vasoli is likely around 35-40 years old. (See Hillegass Resp. at 12; Roger Whitcomb Aff, Defs. Mot. Ex. H. at 9.)

inference that the employer's proffered explanation is unworthy of credence" Sempier, 45 F.3d at 728, or that "an invidious discriminatory reason was more likely than not a motivating or determinative cause" of the employer's decision. Fakete v. Aetna, 308 F.3d 335, 338 (3d Cir. 2002). To demonstrate that the employer's legitimate, non-discriminatory reason is not believable, the "question is not whether the action was prudent, but whether the [plaintiff] has shown 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action.'" Martin v. Health Care & Retirement Corp., No. Civ. A. 02-3398, 2003 U.S. App. LEXIS 9876, at *5-6 (3d Cir. May 20, 2003) (quoting Fuentes, 32 F.3d at 765).

Hillegass contends that Defendants proffered reason for termination is unworthy of credence and is pretext for discrimination because Defendants failed to follow the Borough's own Personnel Policy that required the Borough Council to provide her with advanced notice of her termination.[10] Defendants

[10] Hillegass also seems to suggest that her termination was not based on any legitimate reason because two other Borough Council members, who voted against her termination, believed that she did not have interpersonal problems, as evidenced in affidavits provided to this Court. Although the Borough Council's decision to terminate her from her position was not unanimous, it is clear that a plaintiff cannot demonstrate pretext by simply arguing that "the employer's decision was wrong or mistaken since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." Fuentes, 32

generally admit that they did not follow its Personnel Policy by neglecting to give her notice of termination and offer no explanation why, in Hillegass's case, they failed to apply these procedures. Hillegass contends that since Defendants admittedly did not follow its own procedure, which it had abided by in the past, Defendants' reason for discharge is unworthy of credence. See Poff v. Prudential Ins. Co. of America, 911 F. Supp. 856, 861 (E.D. Pa. 1996) (finding that an employer's failure to follow its policies is evidence of pretext). Since a plaintiff need only provide some evidence for a reasonable juror to conclude that a defendant's proffered reasons were fabricated, we find that Hillegass produces sufficient evidence to raise a genuine issue of fact as to the credibility of Defendants' reason for her discharge, thereby satisfying the minimal standard of proof necessary to survive summary judgment.

C. Section 1983

Defendants finally challenge Hillegass's civil rights violation claim on the ground that she does not have a property interest in continued employment with the Borough sufficient to support a claim under Section 1983, and therefore, is not entitled to due process protections guaranteed by the Fourteenth Amendment or the procedures set forth in the Borough's Personnel

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F.3d at 765.

Policy. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

42 U.S.C. § 1983. To sustain a claim under Section 1983 on procedural due process grounds, a plaintiff must first establish a property interest in her employment. To determine whether a public employee has a property interest in her employment to support a Section 1983 due process claim, a federal court must look to state law. Bishop v. Wood, 426 U.S. 341, 349 (1976); Cooley v. Pennsylvania Housing Finance Agency, 830 F.2d 469, 471 (3d Cir. 1987). Provided a property interest then exists, federal law governs the adequacy of the procedures employed by the defendant to protect this interest. Montross v. Hatboro Borough, No. Civ. A. 01-4734, 2002 U.S. Dist. LEXIS 11387, at *4 (E.D. Pa. Jan. 3, 2002).

Hillegass argues that the Borough's Personnel Policy, which sets forth procedures that the Borough Council must follow when terminating Borough employees, constitutes an implied contract of employment and, therefore, provides Hillegass with a property interest in employment with the Borough. Specifically, the

Personnel Policy mandates that Borough employees must receive advanced notice of any disciplinary action taken by the Borough Council and that discharge "must be based on documentation which establishes a justifiable cause." (Personnel Policy, Hillegass Resp. Vol. II Ex. A.) Thus, Hillegass argues that pursuant to Section 1983, she is guaranteed these procedural due process protections as set forth in the Borough's Personnel Policy.

Significantly, Pennsylvania law adheres to an employment at-will presumption that provides that "absent a contract to the contrary, an employee may be discharged at any time, for any reason." Lloyd v. City of Bethlehem, No. Civ. A. 02-0830, 2002 U.S. Dist. LEXIS 19692, at *6 (E.D. Pa. Oct. 16, 2002); see also Williams v. Philadelphia Housing Auth., 834 F. Supp. 794, 797 (E.D. Pa. 1993); Scott v. Extracorporeal, 545 A.2d 334, 336 (Pa. Super. Ct. 1988). Hillegass contends that the Borough's Personnel Policy created a implied-in-fact contract that overcomes this at-will presumption of employment and provides Hillegass a property interest in her position as Borough Manager sufficient to guarantee her due process and the benefits outlined in the Personnel Policy. Although Hillegass presents caselaw supporting the proposition that an employee handbook or an employer's policies may create an implied-in-fact contract sufficient to create a property interest in public employment, Hillegass fails to first address whether municipalities, such as

the Borough, which are generally "not permitted to enter into employment contracts absent authorizing legislation," may even create an implied-in-fact contract and disrupt Pennsylvania's presumption of at-will public employment. Gallagher v. Borough of Downingtown, No. Civ. A. 98-3885, 2000 U.S. Dist. LEXIS 4951, at *11 (E.D. Pa. Apr. 13, 2000), aff'd, 250 F.3d 735 (3d Cir. 2001); Lynch v. Borough of Ambler, No. Civ. A. 94-6401, 1996 U.S. Dist. LEXIS 7183, at *32-33 (E.D. Pa. May 24, 1996); Skrocki v. Caltabiano, 568 F. Supp. 703, 705 (E.D. Pa. 1983). Without specific statutory authority granting a municipality the right to alter the at-will status of a public employee, any contract created by a municipality, whether express or otherwise, is "invalid and unenforceable" and consequently, does not create a property interest in employment. Montross, 2002 U.S Dist. LEXIS 11387, at *5; Skrocki, 568 F. Supp. at 705. Although the Borough's Personnel Policy required the Borough Council to provide Borough employees with advanced notice of disciplinary action, these provisions do not create a property interest in public employment or guarantee that the Borough Council abide by these procedures. Pennsylvania state law, as well as the Borough's own ordinances, provides that the Borough Manager serves "at the pleasure of the Council" (Borough Code, Defs. Mot. Ex. B.), and "shall be subject to removal by the council at any time by a vote of the majority of all the members." 53 Pa. Cons.

Stat. § 46141. As one court commented, "[t]he Commonwealth has not passed legislation which authorizes Boroughs to abrogate the employment-at-will doctrine . . . . [and subsequent] [s]tate legislative enactments evidence no intent, express or implicit, to allow boroughs to grant their employees a property interest in their employment," Gallagher, 2000 U.S. Dist. LEXIS 4951, at *11.

Since Pennsylvania law "negates any notion that the Borough ha[s] authority to enter into a binding employment contract with the Plaintiff or to otherwise limit its own authority to remove [an employee] under § 46141," we find that state law effectively prevents Hillegass from having a legitimate claim of entitlement to her job as Borough Manager and conclude that any implied-in-fact contract allegedly created by the Borough's Personnel Policy does not create a property interest in public employment sufficient to support a claim under Section 1983. Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 433 (E.D. Pa. 1998). Consequently, since Hillegass does not have the protected right to continued employment, she also is not guaranteed procedural due process protections or the procedures outlined in the Borough's Personnel Policy. See Lynch, 1996 U.S. Dist. LEXIS 7183, at *36 ("Without the protected right to continued employment, an interest in a pretermination grievance procedure lacks substance and thus is meaningless.") Accordingly, we find that Hillegass does not have a property interest in continued

employment with the Borough, and, as such, cannot maintain her c-laim under Section 1983.

Since we disposed of Hillegass's Section 1983 claim, we need not address whether Defendants are entitled to qualified or absolute legislative immunity or discuss whether punitive damages are appropriate.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA HILLEGASS, Plaintiff, v. BOROUGH OF EMMAUS, ROGER WHITCOMB, CRAIG NEELY, LEE ANN GILBERT, SUSAN SCHMIDT, and JOYCE MARIN, Defendants.	: : : : : : : : : :	CIVIL ACTION No. 01-CV-5853

O R D E R

AND NOW, this day of June 2003, in consideration of the Motion for Summary Judgment filed by the Defendants Borough of Emmaus, Roger Whitcomb, Craig Neely, Lee Ann Gilbert, Susan Schmidt, and Joyce Marin (collectively, "Defendants") (Doc. No. 21), the Response of Plaintiff Donna Hillegass ("Plaintiff") (Doc. No. 22), and Defendants' Reply thereto (Doc. No. 25), it is **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED IN PART and DENIED IN PART** to the extent that only Plaintiff's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 623, et seq. and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 955, et seq. remain before this Court.

BY THE COURT:

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JAMES McGIRR KELLY, J.